Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 2001

RICHARD D. DONOHOO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A. Questions for Review

1. Does the statute of limitations as specified in 28 United States Code §2642 commence with the date of the claimed violation?

2. Under the provisions of 28 United States Code §2642, is the date of the violation the date when the claim first accrued?

3. Does the decision of the Eighth Circuit conflict with the decision of this Court in *Unexcelled Chemical Corp v. United States,* 345 U.S. 59, 73 S.Ct.580, 97 L.Ed.821 (1953), a parallel case interpreting a similar statute?

4. Does the decision of the Eighth Circuit conflict with the decision of the Fifth Circuit in *United States v. Core Labs Inc.,* 759 F.2d 480 (5th Cir. 1985)?

5. Does the decision of the Eighth Circuit holding that the limitations period that begins to run only after the government concludes its administrative proceedings effectively eliminates the provisions and purposes of 28 United States Code §2642?

B. List of all Parties

The petitioner is Richard D. Donohoo.

The federal agency involved is the Federal Deposit Insurance Corporation.

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D. Citation of the Opinion

United States of America v. Godbout-Bandal, 232 F.3d 637, (8th Cir. 2000), a copy of which is incorporated in the Appendix.

E. Basis for Jurisdiction

In November 1998, the United States on behalf of the Federal Deposit Insurance Corporation ("FDIC") commenced an action in the District Court of Minnesota to enforce civil money penalties against Richard Donohoo and others arising out of a Order of the FDIC Board of Governors and subsequently affirmed by the Eighth Circuit Court of Appeals. The District Court ordered judgment in favor of the United States.

That decision was appealed by Donohoo to the Eighth Circuit Court of Appeals. Its Opinion affirming the District Court was filed on November 15, 2000. A Petition for Rehearing by Panel and Petition for Rehearing En Banc was timely filed on December 28, 2000. The Order Denying Petition for Rehearing by Panel and Petition for Rehearing En Banc was dated January 29, 2001.

This Petition is filed within 90 days after entry of the Order denying Petition for Rehearing by Panel and for Rehearing En Banc as required by Rule 13 of the United States Supreme Court Rules.

The statutory provision conferring on the Court jurisdiction to review by a writ of certiorari the opinion of

the Eighth Circuit and resulting judgment is 28 U.S.C. §1254, which provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . .

F. Statutes Involved

The statutes include the following:

28 U.S.C. § 2462, which provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

G. Statement of the Case

The facts are not in dispute and are based on the chronology of the events in this matter. The basic dispute

concerns whether Defendant and other investors were required to file under the Change in Bank Control Act of 1978 (12 U.S.C. § 1817 (j)) when they inserted $1,000,000 in cash in Capital Bank, a federally insured financial institution, in July 1990, a time in which the banks in the United States were in a banking crisis. The cash was inserted as capital to meet the capital requirements imposed by the FDIC and without question this capital insertion enabled Capital Bank to survive even to this day without expense to the taxpayers. The FDIC's position was that filing was required. The history of the FDIC enforcement efforts is as follows:

July 1990	Insertion of $1,000,000 as capital in Capital Bank by Donohoo and others with knowledge of the FDIC
August 1992	Donohoo and other shareholders contract for sale of their stock in Capital Bank
September 1992	Assessment of civil money penalties by FDIC; Donohoo and others request an administrative hearing
December 1992	Donohoo and the other investors sell their interest in Capital Bank
April, May 1993	Administrative hearing
September 1994	Administrative Law Judge issues a Recommended Decision
July 1995	FDIC Board of Governors issues Decision and Order modifying

	Recommended Decision and ordering Donohoo to pay $1,000,554
September 1995	Donohoo and others appeals to Court of Appeals for the Eighth Circuit without posting bond or seeking stay of Decision and Order except for one defendant who does post bond
January 8, 1997	Court of Appeals issues decision, *Lindquist & Vennum v. Federal Deposit Insurance Corporation*, 103 F.3d 1409 (8th Cir. 1997)
November 1998	FDIC commences this action to recover civil money penalties

For the purposes of this action, Donohoo is not denying that the violations occurred or that the penalties were assessed, but denies that he owes any money on the grounds that the statute of limitations has run.

The basis for federal jurisdiction in the District Court of Minnesota is 12 U.S.C. §§ 1817(j)(16) (E) and 1818(i) and 28 U.S.C. §§ 1345 and 1355.

H. Argument

By holding that the statute of limitations under 28 United States Code §2642 does not start running until the administrative process results in a final determination, the decision of the Eighth Circuit conflicts with the holdings of

the United States Supreme Court, a well reasoned decision of the Fifth Circuit, and the plain meaning of the statute.

The United States Supreme Court case interpreting a similar statute is *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59, 73 S. Ct. 580, 97 L. Ed. 821, (1953*)*. In that case, the statute was the Portal-to-Portal Act of 1947, 61 Stat. 84,87, 29 U.S.C. § 255, which provided in Section 6 a two-year statute of limitations for any action to enforce any cause of action under the Fair Labor Standards Act of 1938; that section also provides that "every such action shall be forever barred unless commenced within two years after the cause of action accrued." At 345 U.S. 61. In that case, an action to recover from a contractor liquidated damages was commenced within two years from the time when a formal complaint in administrative proceedings was issued, but more than two years from the time when the contractor violated the act. Judge Douglas wrote the unanimous opinion that the cause of action accrued when the violation occurred and stated: "It was from that date that the period of limitations began to run." At 345 U.S. 66.

Judge Douglas then stated:

> This construction, it is said, will prejudice the power of the United States to safeguard the public interest. But if there is prejudice it is the result of the Portal-to-Portal Act which Congress, having made, can refashion.

The instant case is similar. The FDIC cannot complain about the consequences of the statute of limitations and cannot seek to avoid it against Donohoo. Its complaints about the hardships of the statute should be addressed to the Congress, not to this court. After all, the

FDIC had considerable input to Congress when the banking laws in the late 1980's and early 1990's were dramatically revised and extended during the banking crisis. At that time, the duties and responsibilities of bankers and the corresponding penalties were considerably broaden and increased. Congress could have provided for a different period of limitations for the FDIC but it did not do so. Thus, the FDIC was subject to 28 U.S.C. § 2462.

An early decision of the United States Supreme Court supports the clear language of 28 United States Code §2642. As stated with approval in *3M Company v. Browner*, 17 F.3d 1453 at 1457, 305 U.S.App.D.C. 100 at 104, (1993):

> "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." Adams v. Woods, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.). Justice Story, sitting as a circuit justice in a civil penalty case, made the same point as Chief Justice Marshall: "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence."

Certainly the holding of the Eighth Circuit allows prosecutions by the FDIC a "perpetuity of existence". The capital was contributed to the bank in July 1990 with the knowledge of the FDIC. It did not commence its enforcement proceeding until September 1992 after Donohoo and others had executed contracts for the sale of Capital Bank. Over two years had elapsed. In that period of time, the FDIC claimed that it was entitled to a

maximum daily penalty of $1,000,000 for each alleged violation. The total amount sought against Donohoo was over two billion dollars. If the FDIC has waited for two more years, as it claims that it has the right and power to do, the amount would exceed four billion dollars. Obviously, if the FDIC's position is that the time limitations start after the decision of the final reviewing court, the longer it waits, the higher the penalty. There would be no limits and it would render any statute of limitations virtually meaningless.

The Eighth Circuit's decision is in direct conflict with the decision of the Fifth Circuit, *United States of America v. Core Laboratories, Inc.*, 759 F.2d 480, (Fifth Circuit 1985), which had the same issue: "The issue for decision is when a particular statute of limitations begins to run, that of *28 U.S.C. § 2462.*" *Id.* at 481. After citing the statute, the *Core* court stated: The issue for decision is the meaning of 'the date when the claim first accrued.' " *Id.* at 481. The *Core* court stated:

> Under that section, the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings. *Id.* at 482.

After citing the Senate Report and the House Report, it stated at 482, 483:

> It is thus abundantly clear that both the courts and Congress have construed the "first accrual" language of § 2462 to mean the date of the violation.

Practical considerations support this construction. The progress of administrative proceedings is largely within the control of the Government. *Northern Metal Co. v. United* States, 350 F.2d 833, 839 (3d Cir. 1965). The government is exempt from the consequences of its laches (*quod nullum tempus occurrit regi*). *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132, 58 S.Ct. 785, 788, 82 L.Ed. 1224 (1938); *United States v. Hughes House Nursing Home, Inc.*, 710 F.2d 891, 895 (1st Cir. 1983) (private defendant cannot assert laches against government). A limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none. As one court has explained,

> If the penalty does not accrue [under § 2462] until the United States makes an administrative determination that it is due, the United States has within its power to prolong the period of limitations and the producer of rice "would remain indefinitely under the hazard of having penalties imposed upon him . . ." *United States v. Lynn, supra*, 132 F. Supp. [605] at 607. The Court is of the view that such is not the case.
>
> *Appling*, 239 F. Supp. at 194.

We take the same view. The interpretation of § 2462 advanced by the government is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them.

The Eighth Circuit has disagreed with the holding of *Core* by relying on *United States v. Meyer*, 808 F.2d 912 (First Cir. 1987). The argument made in *Meyer* of the difficulty of adhering to the statute of limitations by an agency should be made to Congress. As is readily apparent from an examination of Title 12 of the United States Code and as a result of the then existing banking crisis, the banking laws were substantially amended in the late 1980's and early 1990's to impose greater control over the nation's banks and substantially increase the penalties and enforcement tools available to the FDIC. The FDIC could have requested Congress and Congress could have adopted a different statute of limitations so that 28 U.S.C. § 2462 would be inapplicable. [That section commences with the phrase: "Except as otherwise provided by Act of Congress."] In fact, *Core* was decided in 1985. Both the FDIC and Congress have had plenty of time to reverse that decision by adopting a different statute of limitations for the banking laws or amending 28 U.S.C. § 2462. But such was not done and the FDIC must follow the law. The five years has elapsed.

The Eighth Circuit also noted that the Fifth Circuit's interpretation could encourage violator abuses of the administrative system. However, as *Core* pointed out, the "progress of administrative proceedings is largely within the control of the Government." *Id.* at 482.

The FDIC certainly controlled the progress in this case. Over two years elapsed before the FDIC commenced its case. The hearing was six months later. From that point forward, the time is that utilized by the Administrative Law Judge and the FDIC Board of Governors.

The Eighth Circuit has dismantled the meaning of 28 United States Code §2642 by holding "that where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination." 28 U.S.C. § 2462 does not contain that exception or modification. Thus, the Eighth Circuit has simply created new law. This is not its province; it is the province of Congress.

Furthermore, 28 U.S.C. § 2462 does not state that the five years commences from the date of the decision of the final reviewing court. It does not state that the limitation period for enforcement of any civil fine commences after determination of the civil fine by the agency, such as the FDIC Board of Governors. (The statute does not apply to equitable remedies.) What it states in plain and convincing language is that enforcement of a civil penalty must be commenced within five years from the date when the claim first accrued.

The statute is clear. The enforcement of a civil fine, such as in the instant case, must be commenced within 5 years from the date when the claim first accrued.

Certainly, the rationale for the statute makes sense. The Congress has determined that federal agencies, such as the FDIC, should not be able to keep people at bay for years and years. The FDIC has control of the situation. It determines if and when to assess penalties and the administrative process.

In the instant case, the claim first accrued in July 1990 when the capital was inserted. The FDIC had

knowledge at that time as to the insertion of capital. In any event, it is rather obvious that the claim of the FDIC accrued no later that September 1992 when the FDIC first assessed civil money penalties. Thus, the five-year limitation expired no later than September 1997. The government did not commence its enforcement of the civil fine until November 1998 and thus its enforcement action is simply too late.

Conclusion

Our country was founded on the principle that we are a "government of laws." This decision by the Eighth Circuit abuses that principle and substitutes the idea that we are a "government of governments."

Against alleged banking violators, the laws are interpreted technically, narrowly and precisely. The FDIC imposes daily fines up to $1,000,000 calculated from the date of the alleged violation to the date of the assessment by the FDIC. Indeed, the longer the period the FDIC waits for assessing the fines, the higher the amount of the fines. Good faith and intent are not at issue when assessing the fines.

But when it comes to laws that are not favorable to the FDIC, the laws are to be interpreted widely and loosely and subject to exceptions not contained in the law.

The decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 00-1601

United States of America,	*	
Plaintiff-Appellee,	*	Appeal from the United
v.	*	States District Court for
Cheryl C. Godbout-Bandal;	*	the District of
Bruce A. Rasmussen; Wayne	*	Minnesota
Field;	*	
Defendants,	*	[Published]
Richard D. Donohoo,	*	
Defendant-Appellant.	*	

Submitted: October 20, 2000

Filed: November 15, 2000

Before HANSEN, MURPHY, and BYE, Circuit Judges.

BYE, Circuit Judge.

The district court[1] granted summary judgment to the federal government on its claim for enforcement of an award of civil penalties against defendants for violation of the Change in Bank Control Act, 12 U.S.C. § 1817(j). Defendant Richard D. Donohoo (Donohoo) appeals on the single issue of whether the applicable five-year statute of limitations bars the government's claim. We affirm.

I.

In July, 1990, Donohoo and the other defendants, officers of Capital Bank, inserted $1,000,000 in cash into that institution during the banking crisis, in order to meet the bank's capital requirements. The investment allowed Capital Bank to weather the crisis; but, as it turned out, Donohoo and his cohorts violated the Change in Bank Control Act when they made their investment without first obtaining approval from the Federal Deposit Insurance Corporation (FDIC). See Lindquist & Vennum v. Federal Deposit Ins. Corp., 103 F.3d 1409, 1413-14 (8th Cir. 1997).

The exact details of Donohoo's transgressions are unimportant for purposes of this appeal; however, the following chronology is relevant. In September 1992, the

[1] The Honorable Richard H. Kyle, United State District Judge for the District of Minnesota.

FDIC assessed civil penalties against Donohoo in the amount of $1,000,554.00 for his July, 1990, violation. Donohoo appealed the assessment, and an administrative hearing was held before an administrative law judge (ALJ) in April-May, 1993. In September, 1994, the ALJ issued his Recommended Decision. The FDIC Board of Governors modified the ALJ's decision, and in September, 1995, issued its own decision ordering Donohoo to pay $1,000,554.00. Donohoo appealed the administrative decision to this court; we affirmed the penalty assessment on January 8, 1997. See id. Donohoo then sought a writ of *certiorari* from the Supreme Court, which was denied on October 6, 1997. See Donohoo v. Federal Deposit Ins. Corp., 522 U.S. 821 (1997).

In November, 1998, more than eight years after the commission of the act for which the penalty was assessed, the FDIC commenced this action to enforce the penalty pursuant to 12 U.S.C. § 1818(i). The district court granted the government's motion for summary judgment on December 20, 1999, rejecting without discussion Donohoo's argument that the government could not collect on the debt because the statute of limitations set forth in 28 U.S.C. § 2462 had run.

II.

Donohoo seeks review of only one issue: whether the district court erred in implicitly finding that the government's claim against him is not barred by the statute of limitations. We review the district court's grant of summary judgment de novo. See Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 486 (8th Cir. 1998).

The government proceeds against Donohoo pursuant to § 1818(i)(1) which allows the "appropriate Federal banking agency" to seek "enforcement of any effective and outstanding notice or order issued under this section" in district court. This statutory provision is not equipped with its own statute of limitations; thus, the general statute of limitations for collection of civil penalties, 28 U.S.C. § 2462, applies. Section 2462 states as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

Donohoo argues that the government's claim for enforcement of the penalties assessed against him by the FDIC is barred by this statute. He asks us to interpret the phrase "claim first accrued" to mean the date of the original violation for which the penalty was assessed, i.e., July, 1990. The government, in contrast, argues that the claim does not accrue until the administrative proceedings assessing the penalties are completed.

This question appears to be a matter of first impression in our circuit. The circuits are split on when a claim accrues under this statute of limitations. The Fifth Circuit favors Donohoo's approach. See United States v. Core Labs, Inc., 759F.2d 480 (5th Cir. 1985). The Core court analyzed caselaw arising under the various predecessors to § 2462 and found that "[a] review of these cases clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run." Id. at 482. The court also found support for its position in the legislative history of the Export Administration Act, 50 U.S.C. App. § 2401, the Act pursuant to which the underlying lawsuit was brought. See id. Finally, the court noted that "[p]ractical considerations

support this construction. The progress of administrative proceedings is largely within the control of the Government. A limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none." Id. at 482-83.

The First Circuit takes the opposite position. See United States v. Meyers, 808 F.2d 912 (1st Cir. 1987). In Meyers, another proceeding under the Export Administration Act, the First Circuit rejected Core's reasoning ("the core of Core" id. at 913). Instead, the court held that where the Act which authorizes the assessment of a penalty provides for an administrative procedure for assessing that penalty, the statute of limitations at § 2462 does not begin to run until "the penalty has first been assessed administratively." Id. at 914. The Meyers court noted the "obvious proposition that a claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced." Id. Because the court found the language of the relevant statutes to be unambiguous, it rejected any resort to statutory construction to aid in interpretation. Id. at 915. Further, the court noted that rather than preventing government abuses, the Fifth Circuit's interpretation could encourage violator abuses of the administrative system. If the government has

only five years from the date of the violation to assess a penalty and begin collection proceedings, the violator would have great incentive to delay the process as much as possible, hoping that the government's clock would run out before the enforcement proceedings began. See id. at 919. The court additionally noted that,

> [o]utside of the Fifth Circuit, no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the penalty was administratively imposed.

Id. at 916.

The parties direct us to only one case that has examined the question of when a claim accrues under § 1818. In that case, the court followed the First Circuit's lead and held that "[t]he government could not bring an action in this court to enforce the penalty until the final decision was issued, ...and the assessment was not further appealed." United States v. McIntyre, 779 F. Supp. 119, 122 (S.D. Iowa 1991).[2]

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[2] One other court has considered this question, ironically, in reference to Donohoo himself. During the course of the enforcement proceedings, Donohoo filed for bankruptcy in Florida, pursuant to Chapter 13 of the

The issue has significant consequences. In this case, under the Fifth Circuit's reasonings, the government would have had to commence its collection proceedings by July, 1995; thus, it would now be time-barred from attempting to enforce the penalty against Donohoo. Under the First Circuit's reasoning, however, the action instituted by the government in 1998 would be timely.

We find the First Circuit's reasoning to be more persuasive. We therefore hold that where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination.[3]

Bankruptcy Code. The government protested that the assessment of its fine against Donohoo raised Donohoo's debt beyond the cap for eligibility under Chapter 13. Donohoo countered by alleging that the government could not collect the penalty, because of the running of the statute of limitations period. The United States Bankruptcy Court for the Middle District of Florida, following the First Circuit's interpretation, held that "the assessment did not become final until the Supreme Court denied the Debtor's petition for certiorari on October 6, 1997." In Re Donohoo, 243, B.R. 139, 142 (Bankr. M.D. Fla. 1999).

[3] We need not decide whether an appeal of an administrative decision tot the federal courts would be considered part of the administrative penalty-assessment process, for purposes of determining when the limitations period begins to run. Both the date that the final administrative order

Our conviction that this is the correct rule is reinforced by our observation that § 1818(i) does not allow the government to begin a collection proceeding until the defendant "fails to pay an assessment after any penalty imposed under this paragraph had become final." 12 U.S.C. § 1818(i)(2)(I)(i). In other words, the government is precluded from bringing an enforcement action until the penalty has been finalized through administrative proceedings. Under the Fifth Circuit's rule, the government could find itself unable to collect on a penalty simply because those proceedings have taken too long. A violator should not be able to escape paying a penalty by dragging his feet through the administrative penalty-assessment process. Thus, we hold that the government's enforcement action is timely.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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was entered, and the date the Supreme Court denied review are within five years of the date the government initiated this suit.

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-1601

United States of America,	*	
Appellee,	*	Order Denying Petition
v.	*	for Rehearing and for
Richard D. Donohoo,	*	Rehearing En Banc
Appellant.	*	

The petition for rehearing en band is denied. The petition for rehearing by the panel is also denied.

Judge Loken did not participate in this decision.

(5128-010199)

January 29, 2001

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit